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No. 80-2188

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FRIARTON ESTATES CORP., et al.,

Petitioners,

vs.

THE CITY OF NEW YORK, et al.,

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners purchased, subject to heavy tax delinquencies, 11 parcels of real property on the List of Delinquent Taxes prepared by the City of New York preliminary to in rem foreclosure of the City's tax liens

thereon. They were afforded repeated opportunity to pay those delinquencies on the installment plan, e.g., 15% down and the balance over 8 years, or to pay only such amount as would be payable for real property taxes on the tax delinquents' claimed taxable values as self-assessors, pending judicial review and "correction" thereof. The question presented, therefore, is whether petitioners were denied due process of law by the Courts of the State of New York in granting judgments of foreclosure on finding (22a-23a, 26a) - that petitioners had mooted any due process question as to prior review of ad valorem real property assessments by their "failure to pay even those taxes which would have been due had the valuation been" what they claimed it should be; and that they had unreasonably delayed ju-

dicial review of those assessments for eight years - particularly where foreclosure was required for water and sewer delinquencies alone on 10 of the parcels, in any case (Nelson v. City of N.Y., 352 U.S. 103 [1956]).

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Jurisdiction

The order of the Court of Appeals of the State of New York entered March 26, 1981, dismissed petitioners' appeal as of right from four judgments of the Supreme Court, New York County (entered May 20, 1980) directing that title to 11 parcels of real property be conveyed to the City of New York for non-payment of tax delinquencies - said appeal being dismissed by the Court of Appeals "upon the ground that no substantial constitutional question is directly involved" (1a-19a).* Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(3).

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*Numerals in parentheses followed by small letters (e.g., 1a) refer to pages of Petitioner's Appendix, and those following the letter R refer to pages of the Record before the Appellate Division.

Statement of the Case

Petitioners have resorted to flagrant distortions of the record before the New York State Courts, even "supplementing" that record with choice extracts, dehors the record, from newspapers, "reports," etc. (28a, 30a-40a) to bolster their unsupportable contention that foreclosure of tax liens by the City of New York (hereafter City) resulted in "a deprivation of property without due process of law in violation of the Fourteenth Amendment" (Petition, p. I).

As the record shows, however, those Courts were confronted with tax delinquents who had purchased at nominal amounts, and subject to heavy tax delinquencies, parcels already scheduled for in rem foreclosure of tax liens, and then sought to frustrate collection by casting the City as the real de-

linquent. Thus, for example, one of the petitioners, Rent Control Memorial Corp., purchased its parcel shortly prior to the City's foreclosure action for $1,000 "subject to existing tax liens which are unpaid since July 1, 1974" totaling $11,407, and then counterclaimed therein for $100,000 in damages because of rent control (R189, 479, 395-399). Petitioners' second tactic was to assert, as a defense in the foreclosure action, that their parcels were assessed at "large multiples of fair market value" (Petition, p. 15) - which was belied by the record proof that upon "settlement resulting from hearing" before the City's Tax Commission, they had withdrawn their tax review proceedings for a 22% reduction on 7 of the 11 parcels here involved for 1977/8 and 1978/9 (R117-119). Petitioners' final ploy was to charge the

City with delaying trial of proceedings to judicially review assessments on the subject parcels dating from 1971/2 - a device recognized as specious by the New York Courts in pointing out that "No note of issue was filed by the petitioner in those certiorari cases nor did petitioner make any application to allow the filing of the note of issue or for a speedy trial therein" (22a).

In the 2-year interval between the City's motion to dismiss these various "defenses" and the granting of foreclosure judgment in May of 1980, every effort was made to keep petitioners in title - the City offering to accept a token 15% of delinquencies with the balance payable on installments over an 8-year period, or in the alternative, payment based upon taxable values as claimed in the petitions for judicial review of the

real property assessments pending that review (infra, pp. 14-15). When these offers were rejected by petitioners and the State Courts forced to recognize that they were dealing with speculators in tax delinquent parcels unwilling to pay a dime in tax arrears under any circumstances, judgments foreclosing the City's tax liens were granted and appeals therefrom rejected by the Appellate Division and Court of Appeals. Petitioners' attempt to supplement its abusive attacks upon the City by incorporating in the Appendix to its Petition various diversionary newspaper articles and similar data dehors the record, cannot obscure the hard record proof that the New York Courts fully protected petitioners' right to due process and that petitioners' contrary contention is farcical - as will be shown.

Statement of Facts

(1)

On July 6, 1977, the City commenced a proceeding in the Supreme Court, New York County (Action No. 29), pursuant to N.Y.C. Admin. Code, ch. 17, title D (Foreclosure by Action In Rem) to foreclose tax liens on all parcels in Manhattan delinquent one or more years in payment of taxes (R. 7, 12). Three years of delinquencies in payment of real estate taxes, water and sewer charges had by then accrued against 10 of the 11 parcels here involved - i.e., against the 8 parcels of petitioner Friarton Estates Corp. (Friarton); against the parcel of petitioner Brontel, Ltd.; and against one of the two parcels of petitioner Rent Control Memorial Corp., the other parcel (Block 440 - Lot 51) having two years of real estate

tax delinquencies and no arrears for water or sewer charges (R. 84-90, 250-257; R. 336; R. 411, 409-411).*

One month prior to commencement of Action No. 29 in July of 1977, Friarton acquired one of its 8 parcels (Lot 30 in Block 735), "consisting of approximately 12 tenanted buildings," for $10,000 cash "subject to existing tax liens" in excess of $200,000 and to a purchase money mortgage of $45,000 (R. 185-6, 199, 217, 477-8). Friarton's remaining 7 parcels

*Friarton's 8 parcels were Lots 2-3-4-5-6-7 and 64 in Block 1042, and Lot 30 in Block 735 (R. 7, 17, 27, 37). Brontel's parcel was Lot 49 in Block 1599 (ibid). While Action No. 29 initially included 3 parcels of petitioner Rent Control Memorial Corp. (Lots 51 and 52 in Block 440, and Lot 65 in Block 1621), the City subsequently acquired title to Lot 52 in Block 440 on July 14, 1978 in Foreclosure Action No. 28 (R. 185, 476) - so that Foreclosure was sought against only two of those 3 parcels in instant Action No. 29.

were similarly acquired in June of 1977 for "the total sum of approximately $10,000 cash over real estate taxes and mortgages," tax arrears alone then exceeding $150,000 (R. 478-9, 186-190, 200-206). Friarton thereafter agreed in June of 1978 to a 22% reduction in the assessment of those 7 parcels (from $580,000 to $452,000) for 1977/8 and 1978/9 upon "settlement resulting from hearing" before the Tax Commission (R. 117-119).

Petitioner Brontel, Ltd. had acquired its parcel for $900 on City auction of tax delinquent property in October of 1975 (R. 188, 479). And petitioner Rent Control Memorial Corp. had similarly purchased one of its two parcels at City auction of tax delinquent parcels for $2,500 in October of 1975, its other parcel (Bl. 1621 -

Lot 65) having been acquired in October of 1976 for $1,000 "subject to existing tax liens which are unpaid since July 1, 1974" totaling $11,401 (R. 189, 479).

(2)

In September of 1977, each petitioner herein submitted an identical answer in Action No. 29 by the same attorney (Martin Fine), who was also Friarton's president (R. 70, 236, 322, 395).* Friarton's answer, for example, asserted a counterclaim for $1 million on the ground that rent control had "virtually confiscated" petitioners' property, and foreclosure of tax liens would "actually confiscate the real property * * * for unlawful and unconstitutional political

*Friarton submitted two such answers - one on Block 735 - Lot 30, and a second on the 7 parcels in Block 1042 - Lots 2, 3, 4, 5, 6, 7 and 64 (R. 70, 236).

purposes" (R. 72, 238, 324, 396). A second counterclaim for severance and separate sale was also interposed in each answer, petitioners claiming that their equities in the property were "greatly in excess" of delinquencies and since tax review proceedings were pending "alleging that the real estate tax assessments for tax years 1972-3, 1973-4, 1974-5, 1975-6, 1976-7 and 1977-8 are illegal by virtue of overvaluation," refunds would increase that equity (R. 73, 239, 325, 398).

In July of 1978, the City moved to strike those answers, pointing out, among other things - that the 6-month period statutorily afforded petitioners to sell their property and retain any equity above delinquencies (N.Y.C. Admin. Code, §D17-9.0[e]) had long expired; that petitions to review assessments, dating from 1963/4, had not only been stricken from the calendar for failure to prosecute, but "at no

time has a note of issue been served or filed" by petitioners for trial of any subsequent petition to judicially review any other real property tax assessments on the subject parcels; and that redemption is available both before and after summary foreclosure of tax liens (R. 75-83, 241-249, 327-336, 400-408).

Petitioners thereupon cross-moved in October of 1978 for leave to file amended answers and to consolidate their tax review proceedings with in rem Action No. 29, each of the proposed amended answers demanding "additional time in which to pay said taxes," challenging the City's one-year in rem statute as unconstitutional, and again including a $1 million counterclaim for "confiscation" effected by rent control (R. 98-110, 265-277, 345-357, 453-465). Opposing these cross-motions

as "a dilatory tactic manufactured to prolong this proceeding," the City pointed out that the constitutionality of its one-year in rem statute had been upheld in Sonmax, Inc. v. City of N.Y., 43 NY 2d 253 [1977]); that petitioners, in any case, had acquired their parcels subject to many years of tax delinquencies; that defaults in failing to file a note of issue on any petition for review of real property tax assessments could not justify further delay of tax collection, particularly since a "clear remedy" by way of a token payment with the balance payable on installments over many years was available to petitioners to afford them adequate opportunity to bring their tax review proceedings to trial (R. 120-5, 142-150; R. 284-298; R. 372-377, 388-393; R. 428-433).

Petitioners' response was to unilaterally "consolidate" the subject 11 parcels with 6 additional tax delinquent parcels in Action No. 29, which additional parcels had been purchased at City auction of properties previously foreclosed for unpaid taxes, and with respect to which tax review proceedings were similarly pending (R. 152-164, 189-191; R. 167, 171, 177). And in January of 1979, petitioners moved to consolidate Action No. 29 with In Rem Action No. 30 and for class action status on behalf of all tax delinquents listed therein (R. 435-9).*

*On August 28, 1978, In Rem Action No. 30 was commenced against all parcels in Manhattan delinquent one or more years in payment of taxes, the subject parcels being again included therein for subsequent delinquencies (R. 183).

(3)

In response to these various tactics, the City advised the Court in February of 1979 that although petitioners were speculators in tax delinquent properties and their motions "merely a dilatory tactic to delay foreclosure," the City had nevertheless offered them an installment agreement "under Local Law No. 34 of 1978" whereby a 15% down payment on delinquencies with the balance payable over 8 years would enable them to calendar and prosecute their tax review proceedings (R. 182-197). It was further reported that upon petitioners' rejection thereof, the City had offered to treat petitioners as self-assessors and to accept payment of only "the undisputed taxes, water charges and sewer rents and accrued interest based on defendants' own valuations in the certiorari petitions [for review of

real property tax assessments], and provided the balances were paid within sixty (60) days of the determination of those certiorari proceedings" (R. 182, 192; R. 194-197).

In April of 1979, the City further advised the Court that its offer to accept payment of real estate taxes based on the taxable values claimed in the tax review petitions, pending judicial review of assessments, had been accepted as to the 6 parcels which petitioners had unilaterally consolidated herewith, the City having, as a precondition thereto - "insisted that the certiorari proceedings be calendared, so that a final determination of assessments can be made" (R. 508-510). It was further pointed out that - "None of the petitions have ever been calendared to date, except for the 6 parcels where we stipulated to withdraw the motion" for summary foreclosure on condition that they

be so calendared; and that with respect to the remaining parcels, the tax delinquents declined to even "pay the water and sewer charges with accrued interest, let alone anything on account of taxes" (R. 509-510).*

Petitioners' reply was that the City should be "estopped from continuing its In Rem foreclosure" even as to water and sewer charges because of "unclean hands" due to the City's rent control laws and real property assessments (R. 512, 520). And since the City Council has "again engaged in pure chicanery and trickery for political

*The stipulation dealt with the 6 parcels acquired at City auction of tax delinquent parcels and "consolidated" herewith by petitioners (ante, p. 13). It provides for payment of "all water and sewer charges with accrued interest to date, as well as a portion of the accrued real estate taxes based on the amount of taxes due under defendant's claimed value," and specified that petitioners "shall take all steps necessary to bring on its petitions to trial" (R. 590-592).

purposes" in continuing rent control, payment of water and sewer charges could not be countenanced because "to pay even one further dime of tribute to the City, acting in its so-called police power run amok would be unconscionable" (R. 511-513, 518).

Opinions Below

(1)

One year after the city had moved (in July of 1978) to strike petitioners' answers and to grant judgment summarily foreclosing its tax liens, the City's motions were granted in August of 1979 (20a-24a). The Court found petitioners' defenses (in their proposed amended answers) based on alleged unconstitutionality of the City's 1-year in rem statute to be devoid of merit since it had been upheld in Sonmax v. City of N.Y., 43 NY 2d 253 (21a). Stating that a statutory pro-

ceeding to summarily collect taxes "is not the proper vehicle" for an attack upon rent control as confiscatory, the Court severed and continued each of petitioners' $1 million counterclaims therefor (22a).

Denying petitioners' application to consolidate In Rem Action No. 29 with petitioners' tax review proceedings, the Court pointed out that no note of issue had been filed so as to bring those tax proceedings to trial, albeit they covered tax years as far back as 1971/2 - "nor did petitioner make any application to allow the filing of the note of issue or for a speedy trial therein" (22a). Petitioners' claim of payment was not only unsupported by any evidence thereof, said the Court, but disproven by the City, the record showing that petitioners had refused to pay even "the amount of taxes admitted by defendants to have been properly due" based on the

claimed taxable values set forth in the petitions to review the real property assessments (22a-23a).*

(2)

In denying reargument, the Court made it plain that petitioners refusal to pay real estate taxes based on their own claimed taxable values as self-assessors, so as to obviate any possible injury from delayed refund of excessive taxes, had mooted any conceivable due process question - "insofar as they raise procedural due process questions, such have already been mooted by movant's failure to pay even those taxes which would have been

*In a separate decision rendered that same day (August 31, 1979), the Court denied class action status (R. 56). While granting consolidation of In Rem Actions 29 and 30, the Court's judgments directed that the City take title to the subject parcels in Action No. 29 - and that "Action No. 30 shall be discontinued insofar as such action affects" the subject parcels (R. 56).

due had the valuation been what movant has claimed" (25a-26a).

The Court's four amended supplemental judgments of foreclosure were entered on May 20, 1980 and affirmed without opinion by the Appellate Division (First Judicial Department) on December 18, 1980 (3a-4a, 6a-12a). Appeal to the New York State Court of Appeals was dismissed upon the ground that no substantial constitutional question was directly involved (1a-2a).

Relevant Statutory Provisions

a. N.Y.C. Admin. Code, Ch. 17, Title D ("Foreclosure by Action In Rem") [2A Williams, 1976 ed., pp. 185-207].

(1)

At the time instant Action No. 29 was commenced in July of 1977, Admin. Code ch. 17, title D provided that - "Whenever it shall appear that a tax lien has been due

and unpaid for a period of at least one year from the date on which the tax, assessment or other legal charge represented thereby became a lien, such tax lien *** may be summarily foreclosed in the manner provided in this title" (N.Y.C. Admin. Code, §D17-4.0[a]).*

To summarily foreclose such tax liens, the City's Finance Administrator is required to prepare "a 'list of delinquent taxes,' of all parcels within a particular borough or portion of a borough" detailing the amounts and dates of all unpaid tax liens subject to foreclosure; and the filing thereof in the County Clerk's office commences the proceeding with the same force and effect as the filing of a separate lis pendens and

*A tax lien is statutorily defined as "any unpaid tax, assessment, sewer rent, sewer surcharge or water rent and interest or penalty thereon which is a lien on real property" (§D17-1.0).

complaint "as to each parcel described in said list" (§D17-5.0[a-c]).

(2)

Notice by posting, publication and by mail to all owners and to lienors is statutorily required, advising that any parcel on said list may be redeemed by paying all taxes and charges within 10 weeks of first publication or within the additional 20 day period for filing an answer "and that in the absence of redemption or answer a judgment of foreclosure may be taken by default" (§D17-6.0 [a-b]).

Within that redemption period, "any parcel in said list may be redeemed by paying all taxes and charges in said list of delinquent taxes" - and thereafter, "a late redemption payment * * * shall be accepted by the finance administrator" until preparation

of foreclosure judgment in the in rem action has been commenced (§D17-7.0). If an answer is submitted - the "defendant shall have the right to a severance of the action"; to "additional time in which to pay the taxes and interest or to have the property sold" so that he may retain any surplus above the City's tax liens; to pay the delinquencies at any time prior to the striking of his answer on motion; and to effect such redemption on installments over a 4-year period upon down payment of "at least 25% of such arrears" (§D17-9.0 [a, c, e]; §D17-13.0[a], as amended by L.L. No. 45 of 1976).*

*N.Y.C. Admin. Code, §D17-11.0 provides that "all such taxes, assessments or other lawful charges and the lien thereof shall be presumed to be valid." Pursuant to §D17-9.0 (b, d) - "'No counterclaim may be asserted in an answer interposed in an action brought pursuant to this article," but proof of payment "or that the property was not subject to tax shall constitute a complete defense."

Upon determining that "there has been due compliance by the City with the provisions of this title," the Court shall direct the finance administrator to execute and record a deed to the City as to any tax delinquent parcel not redeemed or withdrawn or as to which an answer has been stricken (§§D17-9.0[c], D17-12.0). Any party "who had an interest in said property as either owner, mortgagee, lienor or encumbrancer" may demand release thereof within 4 months from the time the City's deed is recorded, upon payment of arrears plus 5% thereof (§D17-25.0 [a, f, d]) - an installment plan for payment being available as hereafter noted. And upon expiration of that 4-month period for release on such demand, an additional 20-month period for release in the discretion of the Board of Estimate is also afforded by §D17-25.0(g).

Statutory amendments have repeatedly afforded grace periods for more liberal "payment of delinquent taxes and charges in installments." N.Y.C. Admin. Code §D17-26.0 (3 month grace period from May 9, 1979 to July 31, 1977); §D17-27.0 (4 month grace period from Dec. 1, 1977 to March 31, 1978); §D17-28.0 (5 month grace period from Sep. 1, 1978 to Jan. 31, 1979). During those periods, any parcel on the list of delinquent taxes could be withdrawn therefrom upon agreement to pay 15% of delinquencies and the balance by quarterly installments over twice the delinquency period, not to exceed 8 years. And similar installment agreements were likewise available upon demand for mandatory release made within 4 months of execution and recording of tax deeds to the City (§§D17-26.0[c], §D17-27.0[c]; §D17-28.0[c]).

b. N.Y.C. Charter. Charter §163 provides that during the 6-week period (Feb. 1 through March 15) that "the books of annual record of the assessed valuation of real estate are open for public inspection, any person or corporation claiming to be aggrieved by the assessed valuation of real estate may apply for correction of such assessment," specifying in his application the grounds of any claimed illegality, and the extent of any claimed overvaluation or inequality.

Any such applicant may have a hearing before the Tax Commission, which is empowered to - "compel the attendance of witnesses, administer oaths or affirmations and examine applicants and other witnesses under oath. It shall make rules of practice for proceedings before the tax commission, and such rules and regulations as may be appropriate

and expedient to the end that the taxpayers may have a hearing in the borough in which they reside or in which their property is located" (N.Y.C. Charter, §164). Charter, §165 requires the Tax Commission to render its final determination by the 25th of May; and a further proceeding "to review or correct on the merits any final determination of the tax commission" may be brought by October 25th of that year pursuant to N.Y.C. Charter, §166.

ARGUMENT

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION PRESENTED. TAX DELINQUENTS ARE NOT DENIED DUE PROCESS WHERE THEY ARE AFFORDED ADMINISTRATIVE REVIEW OF AD VALOREM ASSESSMENTS, REFUSE PAYMENT UPON THEIR OWN CLAIMED TAXABLE VALUES PENDING JUDICIAL REVIEW OF ASSESSMENTS, JUDGMENT OF FORECLOSURE IS REQUIRED FOR WATER AND SEWER DELINQUENCIES ALONE, AND THEIR COUNTERCLAIMS FOR RENT REGULATION "DAMAGES" ARE PRESERVED FOR TRIAL.

a. Petitioners' constitutional claims are based on flagrant distortions of the record.

As previously indicated (ante, p. 2), petitioners rely upon rampant distortions of the record as a predicate for their contention that they were denied due process of law by the New York State Courts and to obscure the fact that they were afforded every opportunity to pay real estate taxes based on their own claimed taxable values

so as to obviate any alleged grievance for delayed refund.

It is thus repeatedly asserted, for example, that the impact of rent control was ignored "in the assessed valuations fixed by the City, which were large multiples of fair market value, as shown by arm's-length transactions" (Petition, pp. 15, 5, I). This is flatly belied by petitioners' acceptance of a 22% reduction in assessed values and withdrawal of tax review petitions on 7 of the 11 subject parcels upon "settlement resulting from hearing" before the Tax Commission - even ignoring the fact that the arm's-length transactions referred to reflected prices for parcels subject to heavy tax delinquencies or acquired at City auction of tax delinquent parcels (ante, pp. 3, 6-9).

Similarly unsupportable is petitioners' assertion that - "Both prior to and after the commencement of In Rem Action No. 29, petitioners made every reasonable effort to obtain a tax certiorari trial," but that the City had been "preventing petitioners' tax certiorari cases from coming to trial" (Petition, pp. 7-8). Here, again, the record belies these contentions, showing not only dismissals for failure to prosecute, but subsequent accumulation of 8 years additional tax review proceedings without filing a note of issue as to any of them (ante, pp. 10-11). As the Trial Court pointed out in its decision of August 31, 1979 - "No note of issue was filed by the petitioner in those certiorari cases nor did petitioner make any application to allow the filing of the note of issue or for a speedy trial therein"

(ante, pp. 18-19; 22a).*

It is next said that the New York Courts erred in holding petitioners' refusal to pay real estate taxes on their own claimed taxable values had mooted any due process question as to collection prior to judicial review of assessments - because the offer to pay as self-assessors pending such review was unfairly "conditioned upon petitioners' waiver of basic rights" (Petition, pp. 9-10, 14). This is belied by petitioners' own acceptance thereof on the 6 additional tax delinquent parcels acquired at City auction (ante, pp. 15-16). That the State Courts properly viewed it as a fair means of pro-

*Petitioners' assertion that they were aggrieved by the City's "refusing to hold settlement conferences" (Petition, p. 8) is likewise misleading since the record shows that the Tax Commission had afforded petitioners a hearing at which they were granted reductions on the bulk of the subject parcels (ante, p. 8).

tecting petitioners, by suspending payment of taxes on any amount above claimed taxable value pending judicial review of assessments, is apparent as well from the stipulation itself (25a-26a, 29a). The Courts in New York State will enjoin tax collection and sale of tax delinquent property where due process has been denied the taxpayer or the tax collection process abused. See, Grant v. Srogi, 42 NY 2d 496, 507, 509, 515-517 (1981) - which petitioners vainly urged in the appellate Courts of New York as applicable herein.

With the advent of the City's fiscal crisis in 1975, and consequent reduction of its delinquency period to one year (Sonmax v. City of N.Y., 43 NY 2d 253 [1977]), the City sought to induce payment of delinquencies by affording very liberal terms for installment payments

over an 8-year period (ante, p. 25). As the record shows, petitioners were afforded such opportunity as well, but declined to pay even 15% of delinquencies and the balance over 8 years (ante, pp. 14-15, 18). And when they similarly declined to pay real estate taxes based on their own claimed taxable values pending review of assessments - despite a history of failing to bring those tax proceedings to trial - the State Courts refused to tolerate further procrastination by speculators in tax delinquent parcels thus intent upon altogether avoiding payment. In this, there was no denial of due process or "confiscation" of property for non-payment of taxes as claimed by petitioners (Petition, pp. 1, 5, 9, 11, 13).

In fact, the State Court judgments were fully warranted for water and sewer delinquencies alone on 10 of the 11 sub-

ject parcels (ante, pp. 6-7) - even if there were no delinquencies for real estate taxes. Nelson v. New York City, 352 U.S. 103, 108-9 (1957). While petitioners assure this Court that "the amount of water and sewer charges was in dispute" (Petition, p. 10 fn), they conveniently fail to mention that their proof as to that "dispute" was found insufficient to overcome the statutory presumption in favor of those charges or to require any modification thereof (ante, p. 23). And similarly devoid of substance is their contention that "the City has deprived them of the right to collect rents sufficient to pay any such charges" (Petition, p. 10 fn). It is basic law that water and sewer charges, as well as taxes on rent-regulated property - "are considered to be part of the operating expenses of the building which are passed directly on to the tenants." Plaza Mgmt. Co. v. City

Rent Agency, 25 NY 2d 630, 631-2 (1969). And that the City's rent regulation effects no confiscation of property, see Benson v. Beame, 50 NY 2d 994 (1980), app. dism. ___ U.S. ___ (1981 - 49 U.S. Law Week 3530); Bowles v. Willingham, 321 U.S. 503, 517-518 (1944).*

b. Petitioners were afforded a far higher standard of due process than is required by firmly settled law.

(1)

In support of their attack upon the New York Courts for allegedly denying them a trial

*As aforenoted, petitioners' only defense to non-payment of water and sewer delinquencies was that "to pay even one further dime of tribute to the City * * * would be unconscionable" (ante, p. 17). And as also noted (ante, p. 18), each of their $1 million counterclaims for rent control "damages" were preserved by severance for separate trial - "the general rule prevailing throughout the United States is that taxes are not subject to counterclaims or setoff on the part of the taxpayer." Vil. of Charlotte v. Keon, 207 N.Y. 346, 349-350 (1913).

on real property tax review proceedings accumulated and unprosecuted since 1971/2, petitioners rely upon cases such as Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) - where a debtor was deprived of his property without prior recourse to any Court or State supervision of a creditor's seizure thereof (Petition, pp. 13; 5, 7, 9, 12, 14, 16); Cf. Mitchell v. W. T. Grant Co., 416 U.S. 600, 611-614 (1974), also cited by petitioners (Petition, p. 13) - where even such seizure was held to afford due process when effected under the supervision of a State Court.

"The most summary methods of seizure and sale for the satisfaction of taxes and public dues have been held to be authorized and not to amount to the taking of property without due process of law." Leigh v. Green, 193 U.S. 79, 87-88 (1904). See, King v. Mullins, 171 U.S. 404, 436-7 (1898);

Hersee v. Porter, 100 N.Y. 409-410 (1885); City of N.Y. (801-805 E. New York Ave.), 290 N.Y. 236, 241 (1943); 3 Cooley on Taxation (4th ed.), §1326, p. 2614. So long as an ad valorem property tax "provides a grievance day" before the City's Tax Commission - "the due process clauses are not offended by summary statutory remedies for collection of ordinary taxes." City of N.Y. (801-805 E. New York Ave.), 290 N.Y. 236, 240-1 (1943); see also, Hagar v. Reclamation District, 111 U.S. 701, 708, 710 (1884); Pittsburgh & C. Ry. Co. v. Backus, 154 U.S. 421, 426 (1894); Pittsburgh & C. Ry. v. Bd. of Public Works, 172 U.S. 32, 45 (1899); Utley v. St. Petersburg, 292 U.S. 106, 109 (1934); McGregor v. Hogan, 263 U.S. 234, 238 (1928); Botens v. Aronauer, 32 NY 2d 243, 248 (1973); Hickman v. Wujick, 488 F. 2d 875, 876 (2d Cir., 1973); Mtr. of Appl'n of McMahon v. Palmer,

102 N.Y. 176, 189-190 (1887).*

(2)

"It is well established that one challenging a tax assessment must continue to pay his taxes and that the commencement of an assessment review proceeding does not stay the collection of taxes or enforcement procedures instituted by the taxing authority." Grant v. Srogi, 52 NY 2d 496, 515-516 (1981). The policy of Congress is similarly "to require prompt payment of federal taxes" (Great Lakes Co. v. Huffman, 319 U.S. 239, 301 [1943]). "The assessment is given the force of a judg-

*N.Y.C. Charter, §164 (ante, pp. 26-27) not only provides "a grievance day" before the Tax Commission, but a full hearing with the right to adduce witnesses is required by law. Reiner v. Boyland, 278 App. div. 580 (2nd Dept., 1951), lv. den. 302 N.Y. 951 (1951). As the record herein shows, petitioners had been granted a 22% reduction on 7 of the 11 subject parcels upon hearing before the Tax Commission - albeit the reduced taxes were never paid (ante, p. 8).

ment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt," the usual procedure for the recovery of debts being "reversed in the field of taxation. Payment precedes defense.'" Bull v. United States, 295 U.S. 247, 259-260 (1935); see, Phillips v. Commissioner, 283 U.S. 589, 595-6, 599 (1931); Chapman v. Zobelein, 237 U.S. 135, 138-9 (1915).

And the firmly established rule that "one challenging a tax assessment must continue to pay his taxes" since an assessment review proceeding does not stay enforcement procedures, is especially applicable where the taxpayer refuses to pay not only the allegedly excessive tax, but any taxes at all. As stated in The State Railroad Tax Cases, 92 U.S. 575, 616, 613-614 (1876) -

"is the whole tax void because the assessment is too large? Should they pay nothing, and escape wholly because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due."

(3)

As previously detailed herein, the City did not demand payment of any ad valorem taxes deemed excessive by petitioners but, to the contrary, that they only pay such taxes as were conceded by their own claimed taxable values as self-assessors pending judicial review of the allegedly excessive assessments. Such payment would have effectively obviated any necessity for refunds and, as the State Courts found, effectively mooted any conceivable due pro-

cess question based on petitioners' unsupportable position that judicial review of assessments must precede payment. In addition, and as the record before the State Courts show - foreclosure judgments were required on 10 of the 11 subject parcels for water and sewer delinquencies alone; petitioners were afforded a grievance day on the ad valorem real estate assessments, as required by due process; their petition for further judicial review thereof had been unduly delayed by petitioners' non-prosecution thereof; and they had been repeatedly afforded opportunities to redeem their parcels from the delinquency list prior to foreclosure, and to mandatory release thereof after foreclosure - on an installment basis providing many years for payment in each instance (ante,

pp. 6-7, 38, 14-15, 18).*

(4)

Finally, citing Rosewell v. LaSalle National Bank, 49 U.S. Law Week 4285 (1981),

*To overcome the State Court's finding that petitioners had unreasonably delayed prosecuting those tax review proceedings for almost a decade (22a) - as to which petitioners are silent - they resort to the diversionary argument that after decision herein in August of 1979, and entry of judgments in May of 1980 (5a, 20a-24a; 6a-19a), the Supreme Court, New York County in December of 1980 temporarily stayed all tax review proceedings "pending final Appellate determination of Colt Industries v. Tax Comm." (27a; Petition, pp. 7, 9, 15). In Colt Industries, (183 N.Y.L.J. [No. 108], p. 10, June 4, 1980) that Court had held equalization rates fixed by a State Board for state-aid purposes as inadmissible on review of City assessments since such review is governed by special law (N.Y.C. Admin. Code, §166-1.0) requiring that inequality be shown by "property of like character in the same ward or section." (See N.Y. Laws of 1979, ch. 126, §1; 49A McKinney's Consol. Laws of N.Y. [1980 Supl., pp. 239-240], Real Property Tax Law, §720[3]). It then stayed further trials until its view as to the proper way to prove inequality was ruled on by the appellate courts. The Appellate Division affirmed Colt Industries on May 4, 1981 (439 N.Y.S. 2d 24); and expedited appeal to the N.Y. Court of Appeals has been perfected by Colt Industries.

petitioners contend that ad valorem taxes need be paid "only when a reasonably prompt subsequent adjudication of the merits is clearly available" (Petition, p. 14). The taxpayer had there been judicially awarded refunds on overassessments for 3 successive years before she withheld payment for the fourth year on the same assessment repeatedly found excessive by the State Courts - "Respondent contended that, by requiring payment of taxes 3 1/2 times the lawful amount, petitioners deprived her of equal protection and due process" (49 L W at pp. 4286-7). A 2-year delay in effecting refund of such excess was held insufficient to support Federal Court intervention to stay forcible collection for failure to pay the excessive taxes (28 U.S.C., §1341) - despite the taxpayers contention that assessment practices "produced egregious

disparities" ranging from "as low as 3% and as high as 973% of fair market value" (49 LW at p. 4287). This Court there emphasized, moreover, the "compelling nature" of long-established policy not to frustrate local tax collection procedures (ibid., at p. 4292).

Here, petitioners were afforded every opportunity to avoid payment of excessive taxes by paying only the amount due on their own claimed taxable values as self-assessors pending judicial review of assessments. And this, despite the fact that they had never prosecuted any of their decade-old tax review proceedings so as to show overassessment or entitlement to any refunds plus interest (Gen. Mun. Law, §3-a; 23 McKinney's Consol. Laws of N.Y.) had the delinquencies actually been paid. As previously detailed, moreover, petitioners were dealers in tax delinquent properties unwilling to pay delinquencies

on any basis, no matter how moderate the terms - very liberal installment payments over a period as long as 8 years being rejected by them; and, as already detailed, the bulk of their parcels were subject to foreclosure for non-ad valorem delinquencies (water and sewer charges) alone.

While petitioners baselessly charge that "deliberate actions of the City" obstructed judicial review of their real estate assessments (Petition, pp. 7, 8-9, 14-16) - as aforenoted, the State Courts not only found to the contrary (22a), but will enjoin collection where such judicial remedies have been obstructed by a municipality (ante, p. 32).*

*As a further diversionary ploy, petitioners rely on "reports" dehors the record in asserting that "the City has refused to permit taxpayers generally to gain access" to real

(footnote cont'd on next page)

There is, in short, no substantial constitutional question here presented and, as speculators in tax delinquent parcels, petitioners present no case "of great public importance" (Petition, p. 15) - despite the flagrant distortions of the record, and "supplementary" material dehors the record, relied on to suggest the contrary.

* (footnote cont'd from previous page)

property transfer tax records to aid them in proving inequality (Pet., pp. 15-16). Such records are statutorily required "to be secret" (N.Y.C. Admin. Code, §II 46-15.0; 5 Williams [1971 ed.], p. 220) so as to protect the confidentiality of data furnished by taxpayers. See, Taxation & Fin. v. Dept. of Law, 44 NY 2d 575, 578-9 (1978).

Conclusion

The petition for a writ of certiorari should be denied.

August 12, 1981.

Respectfully submitted,

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